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Molbæk-Steensig, Helga

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**Authors:**

Anastasiia Tokunova  
Andrés García Gómez  
Ema Talam  
Helga Molbæk-Steensig  
Ivan Stefanovski  
Kristin Birkenzeller  
Lorena Diz Conde  
Marjolein Schaap  
Natasha Todorovska  
Rukmani D. Bhatia  
Velislav Ivanov

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**Konrad-Adenauer-Stiftung e.V.**  
Tiergartenstraße 35  
D-10785 Berlin  
Germany  
Phone: +49 30 269 96 453  
Fax: +49 30 269 96 555  
Website: [www.kas.de](http://www.kas.de)

**Rule of Law Programme South East Europe**

**Konrad-Adenauer-Stiftung e.V.**  
5 Franzelarilor Street  
Sector 2  
RO-020785 Bucharest  
Romania  
Tel.: +40 21 302 02 63  
Fax: +40 21 323 31 27  
e-mail: [office.rspsoe@kas.de](mailto:office.rspsoe@kas.de)  
Website: [www.kas.de/rspsoe](http://www.kas.de/rspsoe)

and

**Association "PRAVNIK"**

Bajrama Hasanovica 18  
Sarajevo, 71000  
Bosnia and Herzegovina  
e-mail: [info@pravnik-online.info](mailto:info@pravnik-online.info)  
Website: [www.pravnik-online.info](http://www.pravnik-online.info)

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## CONTENTS

### **PITFALLS OF THE EUROPEAN UNION APPROACH TOWARDS THE WESTERN BALKANS: A REGIONAL PERSPECTIVE**

BY VELISLAV IVANOV ..... 13  
**THE IMPORTANCE OF PUBLIC LEGAL EDUCATION FOR STRENGTHENING THE RULE  
OF LAW**

BY ANDRÉS GARCÍA GÓMEZ..... 25  
**BOSNIA AND HERZEGOVINA'S APPROACH AND THE ROLE OF TRANSITIONAL  
JUSTICE IN THE SPHERE OF ENSURING THE RIGHTS AND FREEDOMS OF  
INTERNALLY DISPLACED PERSONS: LESSONS FOR UKRAINE**

BY ANASTASIIA TOKUNOVA..... 33  
**THE ALLIES AND OPPONENTS OF THE BULGARIAN PROTESTS AGAINST THE  
BORISOV GOVERNMENT, THE "BOSNIAN SPRING" AND THE "CITIZENS FOR  
MACEDONIA" MOVEMENTS AND THEIR IMPACT ON THE POLICY PROCESS**

BY IVAN STEFANOVSKI ..... 47  
**THE RIGHT TO TRUTH AND THE FAILURE OF SEEKING IT**

BY KRISTIN BIRKENZELLER ..... 77  
**THE PROTECTION OF THE WITNESS AS A RISK FOR THE RIGHTS OF DEFENSE IN  
THE CRIMINAL PROCEDURE**

BY NATASHA TODOROVSKA ..... 87  
**ACCOMMODATING MINORITIES IN CONFLICT RESOLUTION: THE CASE OF THE  
MARONITES OF CYPRUS**

BY LORENA DIZ CONDE ..... 99  
**THE UNFINISHED PROMISE OF THE PHILIPPINES PEACE IN MINDANAO**

BY RUKMANI D. BHATIA ..... 113  
**THE LINK BETWEEN GLOBALISATION AND GENDER EQUALITY**

BY EMA TALAM..... 119  
**THE RIGHT TO PUBLIC INTEREST INFORMATION UNDER REGIONAL HUMAN RIGHTS  
LAW: A COMPARISON OF THE EUROPEAN AND THE INTER-AMERICAN APPROACH**

BY MARJOLEIN SCHAAP-RUBIO IMBERS ..... 129  
**BOOK REVIEW: 'GLOBALISING TRANSITIONAL JUSTICE: CONTEMPORARY ESSAYS'  
BY RUTI G. TEITEL, OXFORD UNIVERSITY PRESS. 2014**

BY HELGA MOLBÆK-STEENSIG ..... 147

# **Book Review: ‘Globalising Transitional Justice: Contemporary Essays’ by Ruti G. Teitel, Oxford University Press. 2014.**

***By Helga Molbæk-Steensig\****

## **ABSTRACT**

*Ruti G. Teitel is an established authority within the field of transitional justice. She coined the term in the late 1980s and in the year 2000 she published her monograph ‘Transitional Justice’, which is still for many scholars the entry point into the field, but also a starting point for expanding the field beyond the strict adherence to the legal aspects of ensuring the right to justice.*

*In 2014, Teitel published her new book, ‘Globalising Transitional Justice’. In which she takes stake of the development of the field she founded several decades earlier, and its expansions. ‘Globalising Transitional Justice’ is not a monograph but a collection of Teitel’s essays published elsewhere between 2000 and 2014 along with an introduction and an epilogue detailing the development of the field, both academically, legally, and normatively. It is well worth a read, but the reader should not expect a monograph in the style of her 2000 book, nor a textbook-type final coining of terminology and practical uses of transitional justice. ‘Globalising Transitional Justice’ is a portrait of a field in motion from a scholar that moves with it.*

*\*Helga Molbæk-Steensig holds a BA in Balkan studies and an MA i International studies. Her research focuses on transitional justice and constitutional law as well as human rights protection in European states and on the regional level. On a daily basis she teaches human rights law, constitutional law, legal philosophy and legal sociology at Copenhagen University and is Balkan editor for the Magasine rØST, a danish-language publication on Eastern European culture and society. She also works with the Democracy in Europe Organisation, which provides youth- and adult education on EU-democracy."*

## Introduction

Since Teitel published 'Transitional Justice' in 2000, the field – then described as a legal field ripe for interactions and interdisciplinary cooperation with other fields – has moved in an even more interdisciplinary direction, encompassing aesthetic, economic, social and humanistic fields as well as the field of law, and utilising ground-up theorising and constructivist approaches along the way. This development appears to be the starting point for Teitel's new 2014 'Globalising Transitional Justice'. The new volume takes stake of the current academic, political and practical field of Transitional Justice, and sets out to re-coin the terminology once again:

*"If, before, the centrality of the transitional problem was the predecessor regime and its excesses, and the related aim—constitution-style delimitation of state power—now, the challenge of contemporary transformation is that it engages directly nonstate actors at all levels ... In an increasing number of weak and failed states, ... the overriding goal is the assuring of a modicum of security and the rule of law that, even without other political consensus, one might say, has become a route to contemporary legitimacy."*<sup>382</sup>

In a rather refreshing manner, Teitel asserts no negative judgement on the sprawling field that has moved far from her initial delimitation, but rather aims to recalibrate, re-assess, and reset the gold standard for the academic introduction to the field of transitional justice.

The new book is, however, not a monograph, nor the textbook style introduction to Transitional justice that transitional justice teachers and instructors have been yearning for.<sup>383</sup> It is rather a compilation of Teitel's previously published essays on Transitional justice –

reviewing the change the field has gone through since the late 1980s and especially since the year 2000. It starts out with the essay with the same namesake as the book itself 'Transitional Justice Globalised' from 2008, which presents broad tendencies in the fields response to political events in the post Cold-war period. Following this introductory essay, the book has four parts, *Overview*, *Roots*, *Narratives*, and *Conflict, Transition, and the Rule of Law*.

## Overview

*"One cannot help but be struck by the humanist breadth of the field, ranging from concerns in the fields of law and jurisprudence, to those in ethics and economics, psychology, criminology, and theology."*<sup>384</sup>

The first part of the book has just one essay 'Transitional Justice Globalized'. In this essay, originally published in 2008, Teitel reviews the political focus on the academic field, and how it has changed the questions the field asks, and the results it hopes to achieve. It is a historical account of the conflicts and thus post-conflict efforts that took place from the end of the Cold war until the late 2000s.

She notes that transitional justice was originally conceived to attempt to understand the post-communist transitions in the former Soviet Union in the early 1990s, and that the theory further developed in the meeting with other kinds of transition. The end of the illiberal South American transitioning regimes, of the South African apartheid regime, and the reckonings after the crimes against humanity in Rwanda and Sierra Leone, each represented different challenges. Finally, the development in local transitional justice efforts and hybrid courts in the post Yugoslavian states is noted as contributing a significant political focus on transitional justice and

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<sup>382</sup> Teitel 2014: xiv

<sup>383</sup> Simic 2016: xiv

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<sup>384</sup> Teitel 2014: 3

meriting a change in the approach of the academic field.<sup>385</sup>

The first essay repeats several of the points furthered in the introduction, and specifically notes how the initial debate of impunity versus justice led to a demand for judicialisation in a positivist tradition. This is countered by transitional justice institutions, such as the ICTY having to some extent replaced strict positivism with a more teleological approach to transitional justice in which criminal justice is not merely an end in itself, but should also serve a broader goal of contributing to peace and prosperity in the region.<sup>386</sup>

In short, the first part of the book presents the strong connection there is in transitional justice between political goals, institutional solutions, and academic thought and theorising. The initial essay sets the tone for a book that updates the definition of transitional justice, from a legal discipline to a cross-disciplinary endeavour and normative goal undertaken by states, international institutions, courts and civil society as well as academia.<sup>387</sup>

#### Roots

The second part of the book, *Roots*, has two articles: 'The Universal and the Particular in International Criminal Justice' published in 1999, and 'Transitional Justice: Post-War Legacies' published in 2006.

This part of the book explores the connection between international criminal law and transitional justice. 'Transitional Justice: Post-War Legacies' returns to the famous Nuremberg trials and reviews how the trials can be a starting point for transitional justice studies. It has a focus on how the trials have influenced current

understandings academic and political,<sup>388</sup> and can as such be viewed as a conceptual history analysis in category with Koselleck, Schulz-Forberg, Kølvrå and others.

#### Debating the use of criminal proceedings in transitional justice

In 'The Universal and the Particular in International Criminal Justice' from 1999, Teitel debates the apparent dichotomy between the individualisation of guilt and the crimes against a collective – a group-identity of one sort or the other. Individualisation of guilt is both the form of international criminal justice and to a degree, the point of it. Teitel cites the prosecutor for the ICTY on this "[a]bsolving nations of collective guilt through the attribution of individual responsibility is an essential means of countering the misinformation and indoctrination which breeds ethnic and religious hatred."<sup>389</sup> The argument expressed initially at Nuremberg and perfected at the ICTY is that individualisation of guilt contributes to peace by ending the need for group vengeance.

In this article, Teitel challenges this notion, because she notes that it is difficult to decipher individual motive as is traditional in criminal proceedings in cases where there are crimes against humanity. Because often, there is none. The acts are political and collective, not individual.

"[...] the insistence on proof of individual motive can be misleading, as it obscures the extent to which persecutory policy is a social and above all political construct".<sup>390</sup>

With this rationale, the foundation for the problem and the cause of the crime, the political narratives and collective characterisations are not addressed. In

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<sup>385</sup> Ibid.: 4-5

<sup>386</sup> Ibid.: 5-6

<sup>387</sup> Ibid.: 7-8

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<sup>388</sup> Ibid.: xx

<sup>389</sup> Ibid.: 19

<sup>390</sup> Ibid.: 21

her 1999 article, it is yet unclear how this insight can contribute to transitional justice efforts and the goal of peace or justice.

In the 2006, 'Transitional Justice: Post-War Legacies', Teitel continues this discussion with a specific focus on the Nuremberg trials. She touches upon the question of how to establish guilt for crimes committed by a modern bureaucracy,<sup>391</sup> and arrives at a hybrid solution utilised by post war Germany and evident in contemporary recommendations on transitional justice: Individual criminal responsibility to avoid group vengeance, conceived under the shadow of the Versailles failure after the First World War, and collective responsibility of institutions.

The collective responsibility was established in post-war Germany as a de-nazification of the bureaucracy that carried out the crimes of holocaust. This is mirrored in contemporary transitional justice as vetting and lustration mechanisms as well as institutional reform. Which in turn deals with the dilemma between the need to remove elements from the civil service the cannot claim individual integrity, and the need for experience and continuity in the civil service. This is especially difficult when dealing with the end of an illiberal regime.

#### Narratives

The next part of the book consists of three articles. The 'Human rights in Transition: Transitional Justice Genealogy' from 2003, the 'Bringing the Messiah through law', originally a chapter in the 1999 book 'From Gettysberg to Bosnia', and finally the 'Transitional Justice as a Liberal narrative, originally published in 2002.

In each their way the three articles deal with the concepts of time and collective/individual in the field of transitional justice. The chapter-header

'narratives' deal with the narratives on transitional justice rather than the narratological efforts that are part of modern and contemporary transitional justice storytelling and truth-telling.

Genealogy – the narrative of progression in transitional justice

The 2003 article on the genealogy of transitional justice policies suggests three main phases in the development of the field. The first phase developed in the post-war periods after the First World War and the Second World War. This phase had a strong emphasis on individual responsibility while the post-crime justice moved from the national to the international sphere.

The second phase is described as following the Cold War moment and it delivered a broader view of transitional justice, which included truth and reconciliation as key terminology and normative notions of forgiveness and storytelling as central goals. In a genealogical sense, the second period suggested progression.

*"There is a complicated relationship among transitional justice, truth, and history. In the discourse of transitional justice, revisiting the past is understood as the way to move forward. There is an implied notion of progressive history."*<sup>392</sup>

The third phase described in this article is the contemporary use of transitional justice to address conflicts that have not yet had their end, nor, to some extend can have an end. The use of humanitarian arguments for military interventions in conflict zones or in the war of terror suggests a break with the notion of progressive history, and makes the transitional goal of questioning state action, a difficult one.<sup>393</sup>

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<sup>391</sup> Ibid.: 35

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<sup>392</sup> Ibid. 61

<sup>393</sup> Ibid.: 64

*“As a genealogical perspective illustrates, interest in the pursuit of justice does not necessarily wane with the passage of time. This may be because transitional justice relates to exceptional political conditions, where the state itself is implicated in wrongdoing and the pursuit of justice necessarily awaits a change in regime”*<sup>394</sup>

In the midst of war – a narrative of timing in transitional justice

The second article, the 1999 'Bringing the Messiah through law' also deals with the timing of transitional justice. Specifically in questions why the ICTY was created in 1993, in the midst of the war, rather than at the end of the war. On the one hand, the timing of the court suggests the new normative goal of transitional justice efforts – to further peace. On the other hand, the creation of the court can be viewed as a small effort by an international community that failed to further peace politically or militarily. In an almost pre Second World War legal philosophy, the ICTY can be viewed as an effort to create peace through law.

*“If the ICTY’s lack of political authority undermines its efforts to achieve pacification through deterrence and to accomplish reconciliation through the creation of historical narratives, perhaps the relationship of the ICTY to peace might be conceptualized along different lines. Those who created the ICTY spoke feelingly of the expectation that international criminal justice would establish a form of individual accountability that would break “old cycles of ethnic retribution” and thus advance ethnic “reconciliation.” They propounded a traditional account of liberal legalism, in which the punishment of the law would hold individuals responsible, so as to limit and displace private vengeance.”*<sup>395</sup>

In this essay, Teitel also touches upon the development, that the ICTY ended up –

perhaps because of its timing in the midst of the conflict rather than afterwards – sitting on a large amount of documentation on the crimes committed during the wars in the Balkans in the 1990s, and as such could act as a catalyst for truth-telling and establishment of new narratives. She also notes, however, that the collective nature of the narrative and the individual nature of criminal justice created tension and kept the ICTY from fulfilling this role wholeheartedly.<sup>396</sup>

Positioning – a narrative of transitional justice as political endeavours

The third article in the 'Narratives' part of the book, the 'Transitional Justice as a Liberal narrative' from 2002 explores the symbolic significance of post-conflict trials and asks whether transitional justice is always about furthering a new liberal order.

*“The point of departure in the transitional-justice debate is the presumption that the move toward a more liberal, democratic political system implies a universal norm. Instead, my remarks here propose an alternative way of thinking about the law and political transformation. In exploring an array of experiences, I will describe a distinctive conception of justice in the context of political transformation.”*<sup>397</sup>

Teitel notes that the act of individualising guilt, as is a precursor for transitional justice criminal trials, is an expression of a liberal understanding of society. The responsibility of the individual for crimes of the regime furthers an almost existentialist understanding of personal responsibility despite collective pressures. Meanwhile, the extensive use of amnesty and forfeiture of punishment, suggest that the criminal proceedings have a symbolic nature rather than a punitive nature.

*In periods of political upheaval, legal rituals offer the leading alternative to the*

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<sup>394</sup> *ibid.* 60

<sup>395</sup> *Ibid.*: 86

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<sup>396</sup> *Ibid.*: 85-86

<sup>397</sup> *Ibid.*: 96



*violent responses of retribution and vengeance. The transitional legal response is deliberate, measured, restrained, and restraining, enabling gradual, controlled change. As the questions of transitional justice are worked through, the society begins to perform the signs and rites of a functioning liberal order.*<sup>398</sup>

In an almost Durkheimian way, Teitel argues that the criminal proceedings against the individual has the purpose of freeing the successor regime from the criminal legacies of the earlier state.<sup>399</sup> While that is certainly not a liberal method of transition, the end result can be liberal change when the individual trials are used to further collective narratives of change and reconciliation across old divides.

*The main contribution of transitional justice is to advance the construction of a collective liberalizing narrative. Its uses are to advance the transformative purpose of moving the international community, as well as individual states, toward liberalizing political change.*<sup>400</sup>

Conflict, Transition, and the Rule of law  
The third and final part of the book is also the lengthiest. It is comprised of five articles. The first from 2005, 'The Law and Politics of Contemporary Transitional Justice'. Hereafter, 'Rethinking Jus Post Bellum in an Age of Global Transitional Justice' from 2013. Third, 'Transitional Rule of Law, chapter in Rethinking the Rule of Law after Communism' from 2005. Fourth, 'The Alien Tort and the Global Rule of Law' from 2005, and finally 'Transitional Justice and the Transformation of Constitutionalism' from 2011.

As is suggested by the title of the third part of the book, the themes of the articles span a broad range of topics, but on a

general note, they all concern the conceptualisation of 'transition', 'justice' and 'transitional justice'. Thus, the first article deals with the use of transitional justice in ongoing conflicts and the risk of endangering peacebuilding by engaging in adjudication in the midst of conflict. It notes how humanitarian intervention and transitional justice have common goals and philosophical basis, but how they may also conflict in terms of timing.

*"As the trend toward juridicization continues apace, contemporary adjudications of international humanitarian rights violations serve as both a basis of, and a constraint upon, humanitarian intervention."*<sup>401</sup>

The second article conceptualises transitional justice in relation to jus post bellum and notes that there is a need for both, because transitional justice has a broader perspective than the restorative nature of jus post bellum. Specifically, contemporary conflicts take place in a space where humanitarian intervention is an option, and this expands the need and use for international justice, to before, during and after conflict, and with a broader pragmatic view towards peace and human security.

*"There is a new relationship between the three strands of the law of war. The justification for war, especially where humanitarian justice considerations are prominent, sets the stage for higher expectations of humanitarianism, both in relation to how war is waged and in the responsibilities of the victors post-conflict."*<sup>402</sup>

The third article continues the conceptualising debate, by constructing transitional justice within the framework of the rule of law. Essentially asking whether transitional justice represents a kind of extraordinary jurisprudence as

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<sup>398</sup> Ibid.: 104

<sup>399</sup> Ibid.: 102

<sup>400</sup> Ibid.: 105

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<sup>401</sup> Ibid.: 134

<sup>402</sup> Ibid.: 146

opposed to the rule of law or whether it has the potential of closing a temporal legality gap in much the same way international law and humanitarian law attempts to close a legality gap in relation to space and conflict. It also repeats large parts of 2002-article on liberal narratives of transitional justice, specifically the point about the constructing and symbolic-ritualistic role of law in transition.<sup>403</sup>

The fourth article compares the constructs of transitional justice and international universality with the American statute that allows aliens to bring tort claims to U.S. courts. The limitations of this statute to cases with a significant connection to the U.S. is also debated in relation to the transitional justice nature of the statute.<sup>404</sup>

The final article, originally published as a chapter in the seminal work on comparative constitutional law by Ginsburg and Dixon, deals with the construction of transitional justice in relation to constitutionalisation. Specifically, the essay continues the temporal discussion on the dichotomy between the inherent impermanence of transitional justice measures, and the institutionalisation of the field, effectively making the measures permanent, on occasion directly in the new post-conflict constitutions or in the constitutionalisation of international law. The article also debates the unit of analysis. What happens when transitional mechanisms are made part of identity construction, for example in the accession process for the Balkan states to the EU, which include transitional justice goals and measures? The article questions how transitional justice can be used in an environment where the state is not the centre of analysis.

*The very problem of justice is being reconceptualized, and it no longer centers*

*on the state. If the classic understanding of the role of the state is to protect its citizens, via its central control of use of force, then these contemporary instances point to instances where there has been a loss of such control.*<sup>405</sup>

#### Epilogue – a conclusion

The book ends with a short epilogue, concluding on the previous essays, which for the most part ask more questions than they answer. Therefore, the conclusion also reflects what kind of supra-questions the decade and a half worth of essays asked:

*“The questions that lie at the heart of the global paradigm, such as of what the relationship ought to be of the local to the international, as the experiences of the last decade reflect, cannot be answered in a categorical way. We currently lack and urgently need to have a meaningful understanding of “complementarity,””*<sup>406</sup>

The book ends on a note about the future. Considering how the development of the judicial as a potent international tool for democratisation and the introduction of the rule of law, among other things through the mechanisms of transitional justice, has politicised the judicial, which will create new challenges in the future.

*“The turn to international law and judicialization is often seen as anti-political, when in fact the international criminal tribunal’s statutes are themselves often justified in broader terms of political goals such as peace and security, especially so of tribunals convened during conflict with particular aims in mind. As such, the legitimacy of the international judiciary will be implicitly relativized.”*<sup>407</sup>

Since this book review has the benefit of being three years into the future from when Teitel published the book in 2014,

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<sup>403</sup> Ibid.: 156-158 and 103-105

<sup>404</sup> Ibid.: 177

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<sup>405</sup> Ibid.: 202

<sup>406</sup> Ibid.: 210

<sup>407</sup> Ibid.: 210

we can conclude that she was certainly right about the attempts to relativise the judicial, both internationally, within transitional justice and in established rule of law states. One has to look no further than Great Britain's threats to leave the European Convention on Human Rights, Milorad Dodik's proposed referenda on the legitimacy of the Bosnia and Herzegovinian Constitutional Court, or the American President Donald Trump's repeated fights with the judicial branch of his government, to see the relativizing of international, transitional and established national judicial in action.